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85-600

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

In Re:

BECKNELL & CRACE COAL CO., INC., BANKRUPT

LOLA GAY SLOAN, TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, JOHN SLOAN, MARGARET SLOAN and BRUCE R. SLOAN - - - Petitioners

versus

RUBEN G. HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT, RUBEN G. HICKS, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit erred in affirming the decisions of the United States District Court for the Eastern District of Kentucky and the United States Bankruptcy Court for the Eastern District of Kentucky, holding that the Lease-Purchase Agreement granted the Bankrupt, Becknell & Crace Coal Co., Inc., a fee simple interest in coal.

2. Whether the Court of Appeals erred in remanding to the Bankruptcy Court Trustee's motion for an extension of time to reject or assume the executory portion of the Agreement, where the Bankruptcy Court had previously held the Agreement to be non-executory and the question to be moot, and so not allowing Trustee to accept or reject.

3. Whether the supervisory power of the Supreme Court should be exercised where the decision of the Sixth Circuit has not departed from the decisions of this Court, other Federal Courts and the law of Kentucky defining a fee simple title to coal nor is there a denial of a constitutional right or important question of Federal law involved in the decision of the Sixth Circuit.

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IN THE

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IN RE:
BECKNELL & CRACE COAL CO., INC., BANKRUPT

LOLA GAY SLOAN, Et Al. - - - *Petitioners*

v.

RUBEN G. HICKS, TRUSTEE - - *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT, RUBEN G. HICKS, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Ruben G. Hicks, Trustee in Bankruptcy of Becknell & Crace Coal Co., Inc. (hereinafter referred to as "Trustee") contends that the criteria governing certiorari policy observed by the Supreme Court indicates that the Petition for Writ of Certiorari filed herein should be denied.

STATEMENT OF THE CASE

The Trustee deems it necessary to add the following information to the Petitioners' statement of the case pursuant to Supreme Court Rule 34.2.

On August 21, 1972, Sloans filed, in the Bankruptcy Proceeding of the Bankrupt, Becknell & Crace Coal Co., Inc., a petition to direct rejection of the Lease-Purchase Agreement as an executory contract. Subsequently, Ruben G. Hicks was appointed as Trustee of the estate and an Answer was filed to the Sloan petition asserting a fee ownership to the coal in question. As a precaution, and in case the Court disagreed with the Trustee's interpretation of the document as giving the Bankrupt, and hence the Trustee, a fee simple interest in the coal in question, the Trustee also timely filed an application for an extension of time to reject or assume the document as an executory contract in case it should be so construed. As stated in the application, Trustee believed the Lease-Purchase Agreement conveyed to the Bankrupt a fee simple interest to the coal and that the Lease-Purchase Agreement was not executory within the meaning of 11 U.S.C. Section 110(b). Trustee stated "that unless the above controversy is determined by this Court, the Trustee will be unable to determine the necessity for acceptance or rejection of any such Executory Contract, if any such a contract exists." Trustee's application is set out verbatim in the appendix hereto. (Respondent's Appendix pp. 17-18)

The filing of the application for extension of time proved unnecessary since the Bankruptcy Court agreed with the Trustee's primary contention that the Trustee held a fee interest in the coal and found that the Lease-Purchase Agreement was not the kind of contract which the Trustee must be deemed to have rejected if he does not assume it within the time limits fixed by

section 70(b) of the Bankruptcy Act, 11 U.S.C. Section 110(b). (Petitioners' Appendix p. 21a). Therefore, the Bankruptcy Court ruled that the Trustee's application to extend the time to assume or reject the contract, if executory, was moot. (Petitioners' Appendix p. 34a).

REASONS FOR DENYING WRIT OF CERTIORARI

I. The Decision of the Court of Appeals Is Not in Conflict With the Decision of Any Court.

Supreme Court Rule 17 provides that a review of a petition for a writ of certiorari is not a matter of right, but of judicial discretion and will only be granted when there are special or controlling reasons therefore. The Rule cites as examples, neither controlling nor fully measuring, instances where there is conflict between the decision sought to be reviewed and a decision of the same subject matter by another Federal Appeals Court or State Court of last resort. Here, there is no such conflict.

In arriving at its decisions, the Bankruptcy Court, the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals, Sixth Circuit, reviewed the character of the Lease-Purchase Agreement and supplemental agreements thereto. In so doing, the peculiar character of mining property, in that its value depends on its production, was considered. Since the agreement in question purports to affect title to land within Kentucky, the law of Kentucky should be applied. *Belcher* v. *Elliott,* 312 F. 2d 245 (6th Cir. 1963). Under Kentucky

law, a lease of minerals underlying the surface is a depletion lease, and is treated as a sale of real estate. See *Walker* v. *Felmont Oil Corp.,* 136 F. Supp. 584, vacated 240 F. 2d 912 (W.D. Ky. 1956).

As stated by the Bankruptcy Court in its Memorandum Opinion (Petitioners' Appendix p. 27a), "(t)o a great many people who do not live in coal counties, an instrument having the usual terms and attributes of a lease, would seem to be a lease. Nevertheless, there is a substantial body of law to the effect that the grant of the right to mine coal in the lands of the Lessor, and to remove the coal therefrom, although the instrument may be called a 'lease,' is a grant of an interest in the land itself, and not a mere license to take coal. *School Dist., Etc.* v. *City of Philadelphia,* 79 A. 2d 433, 436."

In support of its holding that the Lease-Purchase Agreement was a sale of the coal interest in fee simple, the Bankruptcy Court found the case to be analogous to *Ramsey* v. *Yunker,* 311 Ky. 820, 226 S. W. 2d 14 (1950). In the *Ramsey* case, the Kentucky Court of Appeals held the instrument in question granted to the party of the second part ". . . all of the oils and gases and all rights thereto . . . in, upon or over or hereafter found in, upon or under the herein described tracts or parcels of land . . . with the exclusive right to enter upon the lands for the sole purpose of operating for, producing, storing and marketing oil, gas and gasoline . . ." The Court held the instrument was a deed to the oil and gas in place because it had all the earmarks of an outright conveyance.

It is well settled that a conveyance may separate minerals and surface into independent legal estates, and mineral estates so created may be dealt with as any other fee interest in land. *Peabody Co.* v. *Pasco,* 452 F. 2d 1126 (6th Cir. 1971); *Commerce Union Bank* v. *Kinkade,* Ky., 540 S. W. 2d 861 (1976); *Kincaid* v. *McGowan,* 88 Ky. 91, 4 S. W. 802 (1886).

This is especially true for purposes of taxation. In *Wolf County* v. *Beckett,* 127 Ky. 252, 105 S. W. 447 (1907), the Court observed that an oil and gas lease

> ". . . carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. The title to the oil or gas is vested by the lease in the lessee. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property which has substantial value and is the subject of frequent sale . . .
>
> "It is contended, however, that the oil in situ, being part of the realty, cannot be severed therefrom except by deed. It is admitted the leases held by the appellees are of the usual kind. They give the appellees the right to drill and operate for oil and gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue said operations so long as same is found in quantities that pay. Appellees agree on their part to deliver one-eighth of all oil found by reason of such operations in suitable pipe lines to the owner of the fee, the lessor, and to pay a fixed sum per year for

> each well the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessees. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplishes the same result? . . . We therefore conclude that the form of contract is immaterial and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paying quantities on the leased premises." *Id.* at 448.

In support of its judgment affirming the opinion of the District Court in part, the Court of Appeals relied upon the principal upheld in its recent opinion in *Godley* v. *Kentucky Resources Corp.,* 640 F. 2d 831, 835 (6th Cir. 1981). Under this opinion, an unambiguous instrument conveying property, or specified property rights, must be construed according to its terms, not according to the creator's intent, and is in and of itself generally determinative in nature and extent of the conveyance. Regardless of the Lease-Purchase Agreement's denomination and hybrid characteristics, under Kentucky law "what is commonly termed a coal mining lease is regarded as the conveyance of an estate or interest in the minerals as land unless the terms of the instrument require a different construction." *Johnson* v. *Coleman,* 288 S. W. 2d 348, 349 (Ky. 1956).

The operable terms of the Lease-Purchase Agreement support the Court's conclusion that the Bankrupt, and hence the Trustee, was granted a fee simple interest in the coal underlying the land. While desig-

nated a "Lease-Purchase Agreement," by its very terms, the Agreement contains words of present demise of all the coal in place to the Bankrupt, together with the right and license to enter upon the premises to remove the coal and to occupy so much of the surface of the premises as may be reasonably necessary for that purpose. The Agreement specifically provides that the Sloans "do hereby bargain, sell, transfer, convey and lease unto the party of the second part, its successors, and assigns, all the minerals and merchantable coal, in, under and/or upon Poplar and Short Mountains in Wayne and Clinton Counties, Kentucky, more particularly described as follows . . ." (Petitioners' Appendix p. 38a).

When a document recites the words ". . . bargain, sell, transfer, convey . . ." in connection with minerals in place and words of inheritance follow, it is presumed that the parties intended them to have their ordinary legal effect, which is to vest in the grantee the entire ownership of the minerals mentioned in the land described. *Kentucky Natural Gas Corp.* v. *Carter,* 303 Ky. 559, 198 S. W. 2d 311 (1946); *Duncan* v. *Mason,* 239 Ky. 570, 39 S. W. 2d 1006 (1931). Further, the use of the terms ". . . lease, grant, convey and confirm . . ." have been held to convey a fee to the coal in place. *Johnson* v. *Pittsburg Consolidation Coal Co.,* Ky., 311 S. W. 2d 537 (1958).

The Lease-Purchase Agreement further gives the Bankrupt ". . . the right and license to enter upon the premises hereinbefore described at all times, and to use so much of the surface thereof as may be reasonably

necessary in searching and exploring for coal." (Petitioners' Appendix p. 41a).

The fact that a substantial down payment is paid by the Bankrupt is also indicative of a transfer of a fee and not a lease. See *Trinity Temple Charities* v. *City of Louisville,* 300 Ky. 172, 188 S. W. 2d 91 (1945) wherein the Court held that the document denominated a lease really gave a fee title to the grantee. The position that a substantial down payment indicates a transfer of title to the coal rather than a lease is also supported by *Kentucky Natural Gas Corp.* v. *Carter,* 303 Ky. 559, 198 S. W. 2d 311 (1947) and *Duncan* v. *Mason,* 239 Ky. 570, 39 S. W. 2d 1006 (1931).

The Agreement in question provided for a total payment of $1,000,000.00 in the form of the initial down payment of $100,000.00 and $900,000.00 by means of royalty on tonnage mined. The payment of a designated number per ton of mineral removed does not make the instrument a lease instead of a deed. *Duncan v. Mason,* 3 S. W. 2d 1006 (Ky. 1931). In this case, after the payment of $1,000,000.00, the Agreement provided that the first party (Sloans) "grants complete ownership of the coal and coal mining rights to the second party" (Bankrupt). (Petitioners' Appendix p. 44a). In essence, the intent within the Lease-Purchase Agreement is to sell all of the coal in place to the Bankrupt for the total sum of $1,000,000.00.

If the Agreement confers upon the vendee (1) the exclusive right to extract the coal, (2) the right to all the coal, that is the right to mine the coal to exhaustion, and (3) requires the vendee to pay a minimum royalty,

that is to pay for the coal even though it is not mined, then the Agreement is a sale of the coal in place. *Hummel* v. *McFadden,* 150 A. 2d 856 (1959).

The Agreement involved in the present case meets all these criteria. Therefore, the finding of the Court of Appeals that the Bankrupt has fee simple title to the unmined coal underlying the Sloan properties is correct and is consistent with the overwhelming case law of Kentucky.

II. The Decision of the Court of Appeals Did Not Depart From Accepted and Usual Judicial Proceedings and There Is Otherwise No Special or Important Reason for Granting the Writ.

In its construction of the terms of the Lease-Purchase Agreement, the Court of Appeals affirmed the holding of the lower court by its determination that the Agreement granted the Bankrupt a fee simple interest in the underlying coal. The Court of Appeals reversed on the question of the executory contract stating that all parties had obligations to perform in the future. The Petitioners state that such a holding is illogical, incompatible and incomplete. They argue, incorrectly, that the Sixth Circuit failed to state, completely, what interest the Trustee now has. In fact, the opinion states that fee simple interest to the coal in place was conveyed to the Bankrupt and thus, pursuant to Bankruptcy Act section 70a(5) (11 U.S.C. 110(a)(5)) reviewed hereinafter, the Trustee would hold a fee simple estate. In view of the fact that the Court of Appeals felt that all parties had obligations to perform in the future and as a result, those portions of the Lease-

Purchase Agreement were executory, the Court held that the Trustee should be given the opportunity to assume or reject the contract. The Lease-Purchase Agreement provides for additional obligations and duties arising out of the grantor's continued ownership of the surface rights. It could only be these obligations that were to be performed in the future that the Sixth Circuit held to be executory. This is a consistent and compatible view of the decision of the Court of Appeals.

In an attempt to create arguments for review by this Court, Petitioners argue that the Court of Appeals has granted to the Bankrupt, and hence the Trustee, a much greater interest than is permissible under the Bankruptcy Act. This statement is entirely incorrect. The Court of Appeals determined that the Bankrupt was granted a fee simple interest in the coal under the terms of the Lease-Purchase Agreement.

Stated broadly, the general rule is that the bankruptcy trustee takes title to all the property of the bankrupt enumerated in section 70a of the Bankruptcy Act (11 U.S.C. section 110), whether such property is in possession or in action, as determined at the time the petition is filed but excepting such property as may be held as exempt. Under section 70a(5) the trustee of the estate of a bankrupt, upon his appointment and qualifications, is vested by operation of law with the title of the bankrupt as of the date of filing, excluding exempt property, all . . ."(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might

have been levied upon and sold by judicial process against him or otherwise seized, impounded, or sequestered . . ."

Section 70a(5) is extremely broad and searching, and has been drawn to comprise all property that the bankrupt may have that may be of use or benefit to him. See 4A *Collier on Bankruptcy,* Paragraph 70.15 (1), pp.135-137 (14th ed. 1978) for a general discussion of paragraph 5 of section 70a reflecting that this clause is obviously the most comprehensive of all clauses dealing with title to bankrupt's property. It includes every vested right and interest growing out of property that can properly be the subject of lawful transfer, levy or seizure. It certainly includes the fee simple interest in the coal held by the Bankrupt herein which is capable of being transferred or assigned under the explicit terms of the Lease-Purchase Agreement itself and could have been levied upon.

The issue from the beginning has been the construction of the rights granted to the Bankrupt under the Lease-Purchase Agreement. Upon determination that these rights were fee simple interest in the coal, this fee simple interest vested in the Trustee under section 70a(5). To suggest that the Trustee received more than the Bankrupt was granted within the terms of the Lease-Purchase Agreement or that the Trustee received a windfall is unjustified.

III. The Court of Appeals Violated Neither Statute Nor the United States Constitution.

The Petitioners argue that the Court of Appeals violated the Fifth Amendment by altering the terms of their Agreement and depriving them of their property without due process. What the Court did was to take the terms of the Agreement and, applying Kentucky law, determine the language to convey a fee simple absolute interest in the coal underlying the Sloans' property. The Court did not change the contract, or alter the rights of the parties; the rights and interests of the parties were established by the contract as written by the Petitioners and set at the time of the Agreement. Nor did the Court violate the provisions of Rule 607 of the Bankruptcy Act. Trustee could neither consistently assume or reject the Lease-Purchase Agreement which he believed to be non-executory in all its aspects.

Trustee believed that the only thing that remained executory about the Agreement was the Bankrupt's obligation to pay. As such, Trustee relied on case law which determined the Agreement was not the kind of contract which a trustee must assume or reject within the time limits fixed by section 70(b) of the Bankruptcy Act, 11 U.S.C. Section 110(b). *Stell Manufacturing Co.* v. *Gilbert,* 372 F. 2d 113, 115 (5th Cir. 1967); *In Re Kostling,* 350 F. Supp. 1071 (D.C. Conn. 1972); *Lam* v. *White,* 204 Ky. 557, 264 S. W. 1113 (1924). An application was filed within the statutory time period to enlarge the time to assume or reject in the

event that the Agreement was held to be executory. Since the Bankruptcy Court and later the District Court held the Agreement to be non-executory in its entirety, the Trustee could not have consistently assumed or rejected and the application to extend was deemed unnecessary. When the Court of Appeals reversed in part and held a portion of the Agreement to be executory, it correctly noted that the Trustee had never been given an opportunity to assume or reject, and so remanded.

The Petitioners have cited the case of *Bank of Marin* v. *England,* 385 U. S. 99, 17 L. Ed. 2d 197, 87 S. Ct. 274 (1966), which stated that "there is an overriding consideration that equitable principles govern the exercise of Bankruptcy jurisdiction." The Petitioners have used this citation in their argument that nothing would be more inequitable than to take away the property of the Sloans, and transfer it to the Trustee, for the benefit of creditors of the Bankrupt. Obviously, the Court has not taken away or deprived the Sloans of their property. The Lease-Purchase Agreement construed by the Court in applying Kentucky law conveyed to the Bankrupt a fee simple absolute interest in the underlying coal of the Sloans' properties. In view of the fact that the Court of Appeals has determined that portions of the Lease-Purchase Agreement are executory and that the Trustee should be given the opportunity to assume or reject, nothing would be more inequitable than to not allow the Trustee to now have the opportunity to assume or reject the Lease-Purchase

Agreement in order to benefit the creditors of the Bankrupt.

IV. The Petition Presents No Important Issue of Federal Law That Should Be Decided by the Supreme Court.

It should be noted that the action below was governed by the Bankruptcy Act, the law preceding the Bankruptcy Code of 1978. Since the Act applies only to those cases filed prior to 1978, its application is not an important question of federal law. The issue of its application does not merit consideration by the Supreme Court. Neither would the review of the Court of Appeals construction of contractual terms merit the granting of review by this Court.

CONCLUSION

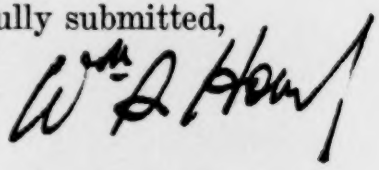
The Petition for Writ of Certiorari should be denied for the reasons set out in the Argument above. The jurisdiction conferred upon the Supreme Court to review cases on certiorari was not merely to give the defeated party in the Circuit Court of Appeals another hearing. As stated by Mr. Chief Justice Taft in *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163, 164, 67 L. Ed. 922, 924, 43 S. Ct. 531 (1923), certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." The strict criteria governing certiorari policy observed by the Court must be enforced to be respected. The issues which are argued by Petitioners are not deserv-

ing of consideration for review when the above criteria are applied.

Here, each of the lower courts have rendered decisions consistent with the overwhelming case law of Kentucky regarding Trustee's fee simple estate in the coal underlying the Sloans' land. As stated by the Petitioners in their Petition for Writ, "a respected bankruptcy judge" determined that the application for an extension of time to reject or assume which was timely filed by the Trustee was moot because of his finding that the Agreement was not executory within section 70(b) of the Bankruptcy Act. This ruling was upheld by the District Court.

In its determination that portions of the Agreement were executory, the Court of Appeals was correct in its assessment that the Trustee had not had an opportunity to assume or reject and should be given such opportunity. As such, the Sixth Circuit's decision does not demonstrate unacceptable conduct requiring this Court's supervision and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX

APPLICATION TO EXTEND PERIOD WITHIN WHICH TRUSTEE SHALL ASSUME OR REJECT EXECUTORY CONTRACT—Filed November 3, 1972

To The Honorable Joe Lee, Referee In Bankruptcy:

The Application of Ruben G. Hicks, Trustee herein, respectfully represents:

1. Your Applicant is the Trustee of the above named estate, having been appointed October 6, 1972.

2. That the above named debtor has been adjudged a bankrupt.

3. That the above named bankrupt has by a writing dated the 22nd day of January, 1970, acquired an interest in real estate from Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, John Sloan, Margaret Sloan and Bruce R. Sloan. That the nature of the interest acquired by the above named bankrupt pursuant to the said agreement is the subject of a controversy presently before this Court. That your Trustee herein in the said controversy asserts and verily believes that the interest acquired in the aforesaid real estate is a fee simple title thereto.

4. That the bankrupt by a writing dated the 8th day of February, 1969, acquired an interest in other real estate from D. C. Byers, Flonnie Byers, David W. Byers, Sallie Ann Byers, Ruth Byers Graves, and Fred Graves. That this said real estate interest is the subject of a controversy now before this Court. That in the said controversy the trustee asserts and verily believes that the interest acquired in the said real estate was a fee simple title thereto.

5. That the Trustee believes that his claim to a fee simple title in the bankrupt in and to the aforesaid two tracts of real estate will be sustained by this Court. That,

however, if the said claim of the Trustee is not sustained, the aforementioned agreements could be interpreted as Executory Contracts between the said bankrupt and the above named persons.

6. That until the above controversy is determined by this Court, the Trustee will be unable to determine the necessity for acceptance or rejection of any such Executory Contracts, if any such contracts exist.

7. That it would be in the best interest of the creditors of the bankrupt estate to grant to the Trustee for the above reasons an extension of time to allow him to make such election as provided in Section 70B of the Acts of Congress relating to bankruptcy if the aforementioned written documents should be adjudged by this Court to be Executory Contracts.

WHEREFORE, your Applicant prays the Court for an Order extending the period within which he, as Trustee, shall assume or reject the Executory Contract relating to real estate herein, if any such writings are deemed to be such Executory Contracts, and that he be allowed such time after such finding of this Court to accept or reject any such contracts, and for such other relief as is just.

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